United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-6120

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

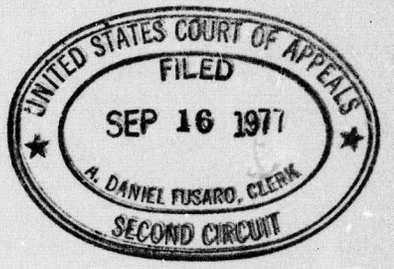
LIONEL J. BASTIEN,

Plaintiff-Appellant,

-vs-

JOSEPH P. CALIFANO, in his official capacity as Secretary of Health, Education and Welfare,

Defendant-Appellee.



BPI

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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STATEMENT OF ISSUES PRESENTED

The only issue presented for review on this appeal is whether the decision of the appellee Secretary of Health, Education and Welfare denying Social Security disability benefits to the appellant was supported by substantial evidence.

STATEMENT OF THE CASE

The plaintiff commenced this action for revie of a decision of the Secretary of Health, Educatic and Welfare denying his claim for Social Security disability benefits. Specifically, plaintiff alleged that the Secretary's decision was not supported by substantial evidence.

This action was commenced on May 28, 1976 by filing a complaint and order allowing plaintiff to proceed in forma pauperis. Subsequently, the defendant Secretary moved for summary judgment. Plaintiff opposed that motion and counter-moved for summary judgment. In a decision dated July 8, 1977, the Honorable Harold P. Burke granted summary judgment to the Secretary by order and judgment. Plaintiff appeals that decision.

The appellant (the plaintiff below) is an individual suffering from severe and progressive degenerative arthritis and impairments of his hands. Appellant is now 57 years of age and has only eight years of schooling. He alleged permanent disability since June 29, 1973 but the first medical confirmation of permanent disability was on January 14, 1974 (A-212-213) after appellant was laid off from his last job because his physical

condition made him a bad employment risk. (A-116, 120, 228)

Plaintiff has experience as an army cook (nine years) and as a janitor, laborer, checker and fork-lift operator involving heavy lifting for the R.T. French Company (22 years) (A-108, 111,204). Plaintiff suffered work-related injuries in 1968 (146-147) and 1973 (A-204) for which he received workmen's compensation.

Plaintiff ceased working for R.T. French Company in June, 1973 when he was laid off in contemplation of the plant he worked in moving operations down south. He later worked briefly for VWR but was discharged as a bad employment risk (A-116, 120, 228). He later applied for employment at Xerox but the company doctor refused to certify him. (A-112).

Because of his work related injuries (1968-injured right shoulder and upper-back A-146; 1973- injured his back A-204) there are a good number of Workmen's Compensation medical reports in the record. However, appellant's claim for disability was based on his progressive degenerative arthritis and hand problem.

Dr. Sewall Miller, Jr., appellant's treating physician traced the developing case of arthritis through his medical

reports. Soon after the 1973 accident he saw appellant for the first time. (A-219). While his report focused on the work related injury, he also noted degenerative changes in the thoracolumbar spine. (A-219). In March, 1973 he reported appellant recovering from his work related injury. (A-218). However in May, 1973, he described osteophytic spikes in the cervical spine and sensory losses. He also described appellant's problems with his hands including numbness and related it to an old operation. (A-217).

In June, 1973 Dr. Miller found the low back problem to have settled down to one chronic in nature but allowing work. (A-215 and basically gave the same diagnosis in August, 1973 (A-203). He did point out that appellant had complaints of shoulder pain and osteoarthritis.

In January, 1974, Dr. Miller reported X-rays had shown severe degenerative changes in thoracic spine. (A-212-213). He diagnosed degenerative arthritis and stated that the injury in June, 1973 may have set off an irreversible chain of events. He said appellant was permanently disabled from heavy lifting and could only do light jobs.

Dr. Miller again stated appellant had severe degenerative arthritis, on March 21, 1974 and reported that he cannot do the same type of heavy work he had before while being unable to obtain any employment because of his history of arthritis. (A-210).

On March 15, 1974 a Dr. Egel examined appellant and reported he was having degenerative changes of both the cervical spine and lower thoracic spine. (A-228-230). He tried to disassociate these changes from the 1973 injury. He did opine that the degenerative process limits him in job choices. On May 21, 1974, Dr. Miller agreed with this statement but attempted to reconnect the 1973 injury with the progressive arthritis saying he had a partial disability second to the accident which activated and aggravated his underlying condition. (A-209).

Dr. Sewall Miller continued to report on the increasingly severe arthritis and its totally disabling nature during the next year and the fact that the appellant did not work during that period. (A-210,209,208,207,206). The last report was February 20, 1975. (A-205)

Plaintiff drives, but testified that he doesn't go far since his back gets tired. (A-69) The farthest he drives is to Lyons, New York, 38 miles away; he makes no trips in excess of 75 to 100 miles. (A-69) Plaintiff further testified he could not work due to complications from his condition, could not even cut the hedges or hold things in his hand. He cited an incident at home wherein he dropped his coffee cup as if he could not hold or grasp anything and a force had opened his hand. (A-70-71) The only thing he could do, he stated, was to guide an electric lawnmover while his wife and son raked up the grass. He hires boys to clean his driveway in the winter. (A-71) He stated that he still cannot stoop over and instead he goes to the

ground on one knee. He cannot twist his neck. (A-82).

ARGUMENT

APPELLANT HAS SHOWN THAT HE WAS UNDER A DISABILITY AND UNABLE TO PERFORM SUBSTANTIAL GAINFUL EMPLOYMENT; THE CONTRARY DECISION OF THE SECRETARY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The sole issue before this court is whether the determination by the Secretary that appellant was not under a disability was supported by substantial evidence. 42 U.S.C. §405(g); Adams v. Weinberger, 521 F.2d 656, 658 (2d Cir. 1975). Accord, Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38, 40 (2d Cir. 1972). Appellant respectfully urges this court recognize that the Secretary failed to introduce substantial evidence to support his determination that appellant was not disabled in the following respects:

a. The Secretary relied on medical reports made for the limited purpose of determining the disabling nature of work-related injuries in the calculation of Workmen's Compensation benefits. The Secretary failed to acknowledge or discuss the limited nature of these reports or the fact that the standards for determining disability under Workmen's Compansation are markedly different than those employed in Social Security disability determinations.

b. The Secretary thus improperly discredited the reports of the appellant's treating physician who had a long standing relationship with appellant. This physician, Dr. Sewall Miller, Jr., in his medical reports described an increasingly severe and disabling case of degenerative arthritis of the spine leading to his eventual conclusion of disability. The Secretary dismissed these findings which were supported by clinical evidence by implying the doctor was bowing to pressure from appellant, without any supporting evidence.

c. The Secretary failed to discuss or consider the fact that appellant due solely to his work-related injury in 1973 was found 33 1/3% disabled for purposes of Workmen's Compensation Benefits.

d. The Secretary unjustifiably determined that appellant could return to his previous employment as a checker after finding that he was incapable of the physical activities required by that position. The Secretary also improperly found that appellant could perform sedentary work without supporting evidence.

e. The Secretary incorrectly dismissed appellant's contentions regarding pain and the limitations on his daily activities as unsupported by the evidence by relying solely on the Workmen's Compensation medical reports; the one time examinations by the doctors for the Workmen's Compensation determinations; and by disregarding the reports of appellant's treating physician, Dr. Miller.

In light of these defects in the determination by the Secretary, it should be held that his decision was not supported by substantial evidence.

Substantial evidence has been defined by the Supreme Court as "...more than a mere scintilla. It means reasonable evidence as a reasonable mind might accept as

adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401,91 S. Ct. 1420, 1427 (1971), quoting from Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938).

A court may not review solely the evidence supporting the Secretary in determing whether substantial evidence exists. The evidence must be viewed in the light furnished by the record in its entirety, including the body of evidence opposed to his view. Dolan v. Celebrezze, 381 F. 2d 231, 233 (2d Cir. 1967).

Though it is not disputed that appellant bears the ultimate burden of persuasion in establishing eligibility for disability benefits, this court has repeatedly held that the standard for eligibility is to be applied "in light of the fact "the Social Security Act is a remedial statute, to be broadly construed and liberally applied."" Gold v. Secretary of Health, Education and Welfare, supra, at 41, quoting from Haberman v. Finch 418 F.2d 664, 667 (2d Cir. 1969).

This Court has likewise held that congressional policy underlying the Social Security Act requires the Court to interpret the Act liberally to resolve any doubts in favor of coverage, Herbst v. Finch, 473 F.2d 771, 775 (2d Cir. 1972), and not to construe the Act in "niggardly fashion" to deny coverage. Steele v. Richardson, 472 F.2d 49 (2d Cir. 1972). Accord, Damon v. Secretary of Health, Education and Welfare, 557 F.2d 31, 33 (2d Cir. 1977).

This Court has recognized that while hearings on social security disability claims are not adversary proceedings, where the disability benefits claimant is unrepresented by counsel, as was the case here, the administrative law judge has a duty to scrupuously and conscientiously probe into, inquire of and explore for all relevant facts. Cutler v. Weinberger, 516 F.2d 1282, 1286 (1975). The lack of legal representation can, in part, also heighten the duty of the reviewing court to make a "searching investigation" of the record. Gold, supra, at 43, citing Miracle v. Celebrezze, 351 F.2d 361, 382-383 (6th Cir. 1965).

In order to qualify for disability payments under the Social Security Act, the wage earner must show disability on or prior to the last date he was insured under the act. 42 U.S.C. §§416(i), 423(c); Gold, supra, pp 40-41.[1] Therefore, appellant must have proved prior to that date he was "unable to engage in any substantial gainful activity by reason of any medically determinable mental or physicial impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d).

Four elements of proof must be considered in determining the ability of the appellant to work:

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1 At the time of the hearing, the plaintiff was specially insured until 1978 so he could have proved a disability through the time of the hearing and the review by the Appeals Council which constituted the final action by the Secretary (A-36).

1. objective medical facts and clinical findings;

2. diagnoses and medical opinions of examining physicians;

3. subjective evidence of pain and disability as testified to by plaintiff and corroborated by others who have observed him;

4. the age, educational background and work history of plaintiff.

All of these elements of proof must be considered together and combination with each other, in order to consider the interaction and cumulative effects of each ailment Gold, supra, at 41.

Once the appellant demonstrated his inability to perform his customary occupation, the burden of proof shifted to the Secretary to show that appellant, given his age, education and work experience, had the capacity to perform a specific job that exists in the national economy. Wyatt v. Weinberger, 519 F.2d 1285, 1287 (4th Cir. 1975). Accord, Hernandez v. Weinberger, 493 F. 2d 1120, 1123 (1st Cir. 1974); Terio v. Weinberger, 410 F. Supp. 209, 213 (W.D.N.Y. 1976); Robinson v. Richardson, 360 F. Supp. 243, 248 (E.D.N.Y. 1973).

If there are no findings to the latter, the Secretary's decision will be sustained only if there is substantial evidence that the plaintiff's impairment does not prevent him from engaging in his previous customary occupation. Smith v. Weinberger, 394 F.Supp 1002, 1006 (D. Md 1975). The Secretary cannot be said to have pinpointed a specific job in the instant case as he had found that the appellant could not perform the physical task required by the one job he found the appellant could do. Likewise, the Secretary's decision that appellant was not disabled was unsupported by substantial evidence.

A. Undue Reliance by the Secretary on Medical Reports Made for the Limited Purpose of Appellant's Unrelated Claim for Workmen's Compensation Benefits.

The Secretary founded his erroneous conclusion of non-disability on medical reports made by doctors who examined appellant for the limited purpose of determining

whether he suffered from any work-related injuries sufficient to qualify him for workmen's compensation.[2] Only the disabling nature of a work-related injury may be considered in a Workmen's Compensation case. Thus, statements by Dr. Leve, (A-220-221) Dr. Porta, (A-224-225). Dr. Maggio, (A-226-227) and Dr. Egel (A-228-230) cited by the administrative law judge in his decision (A-30-44) to support his finding that the arthritis of the back was not disabling, were reports not made for Social Security benefits but were phrased in the language of the Workmen's Compensation Law of New York. They were not addressed to the arthritis but rather to

the work-related injury appellant suffered in February, 1973, spraining his back (A-204). These doctors were obliged to find appellant not disabled under the Workmen's Compensation Law once his work related injury

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2 In New York, each designated employer is required to "secure compensation to his employes and pay or provide compensation for their disability...from injury arising out of and in the course of employment without regard to fault as to the cause of the injury..." McKinney's, Workmen's Compensation Law §10.

1007.

B. The Administrative Law Judge Thus Improperly Discredited the Medical Reports of Appellant's Treating Physician Which, For the Most Part, Dealt With the Non-Work Related Progressive Disabling Arthritic Condition.

Dr. Sewall Miller, Jr., the treating physician was the only physician with a long-standing relationship with appellant. Dr. Miller was the only doctor who was

resolved itself, regardless of the fact that he may have been disabled from other ailments for Social Security purposes.

Disability for Social Security benefits does not require a work-related injury but a disability from any impairment, which prevents substantial gainful employment. 42 U.S.C. §423(d). The failure of the administrative law judge to discuss the limited nature and purpose of these Workmen's Compensation medical reports leads to the conclusion that he failed to consider it. DePaepe v. Richardson, 464 F.2d 92, 99 (5th Cir 1972). Accord, Smith v. Weinberger, supra, at

diagnosing and treating the degenerative spinal arthritis suffered by appellant.

As discussed in the proceding point, the other medical reports in the record dealt solely with a work-related injury. Nevertheless, the administrative law judge limited the consideration of Dr. Miller's prognosis and conclusion by citing these other reports, several of which were made after a one-time visit with the physician.

While the Administrative Law Judge was correct in stating that the opinion of Dr. Sewall Miller that appellant was disabled was not controlling, his mere "consideration" of that report was not sufficient. Oppenhein v. Finch, 495 F.2d 396, 398 (4th Cir. 1974). The "opinion of a claimant's treating physician is entitled to great weight, for it reflects an expert judgment based on a continuing observation of the patient's condition over a prolonged period of time." Vitek v. Finch, 438 F.2d 1157, 1160 (4th Cir. 1971). Accord, Oppenhein v. Finch, supra.; Robinson v. Richardson, supra., at 250.

The language of the decision by the Administrative Law

Judge (See A- 50) demonstrates that "great weight" was not afforded the finding of Dr. Miller. In fact, each time Dr. Miller found that appellant was totally disabled, he supported his conclusion with specific clinical findings. (See eg. Report of Dr. Miller, A-212-213,207).

C. The Secretary Failed to Consider The Finding of the Workmen's Compensation Board that the Work-Related Injury Alone Had Caused a Partial Disability of 33 1/3%.

Nowhere in the decision by the Secretary can be found any discussion of the finding by the Workmen's Compensation Board that the work-related injury, suffered by appellant in 1973, independently had resulted in a permanent partial disability of 33 1/3% (A- 100, 101, 234) , again leading to the conclusion that it was not considered. DePaepe v. Richardson, supra. "While the determination of another governmental agency that a social security disability benefits claimant is disabled is not binding on the Secretary, it is entitled to some weight. (citations omitted). Cutler v. Weinberger, supra., at 1286.

D. The Secretary Incorrectly Determined That Appellant Could Return to His Previous Work After Finding He Could Not Engage in the Physical Activities Required By That Employment And Determined He Could Perform Sedentary Work Without Supporting Evidence.

Appellant stated that he had previously worked as a checker which required him to pick up freight with an electric walkie and pull it with "brute force" five-hundred to one-thousand feet to the loading dock and then check it off as he and the driver loaded the trucks (A- He also stated he subsequently worked shortly as a checker subsequent to that but was "constantly bending up and down." (A-71-72, 77).

Despite his finding that appellant could not do such work, which "involved heavy labor or work which requires regular bending, heavy lifting, constant stooping, long standing or walking for extended distances or periods ..." (A-47,50) he found appellant could perform his previous employments. This finding was not supported by substantial evidence.

The finding that appellant could perform sedentary work was equally unsupported. The appellant testified that he cannot drive very far because he gets tired (A-60); he cannot even cut his hedge anymore (A-81) he loses strength in his hand and even has dropped cups of coffee (A-70-71) and he cannot stoop and he cannot turn his neck very far (A-82).
The appellant was also forced to stand during the entire hearing because of discomfort (A-68).
something not even discussed in the decision.

In a statement given to the Social Security Administration on November 21, 1974, appellant stated his fingers and arms swell from arthritis. He stated his condition seemed worse, he took medication for pain all the time and he gets severe headaches once a week which wake him from sleep. (A-129-130).
These conditions were confirmed by Dr. Miller (A-205).
The administrative law judge failed to investigate these conditions at the hearing and failed to reconcile them with his finding that appellant could do sedentary work.

Also ignored was the fact that appellant had been dismissed from VWR his last job because he had been found a bad risk because if his physical condition (A-116, 120, 228).

He later applied for work at Xerox but the company doctor would not certify him for any job (A-112)

This should have been some indication that appellant was unable to perform any "substantial gainful employment", for that phrase must be read in light of what is reasonably possible, and not what is conceivable. Terio v. Weinberger, supra, at 214. "Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available. Kerner v. Flemming, 283 F.2d 916, 921 (2d Cir. 1960). As stated in Terio, at 214:

> The Court of Appeals for the Fourth Circuit has cautioned both the Secretary and the courts that where
>
> > . . . the possibilities of obtaining employment are practically nil, it is no answer that the claimant may be theoretically capable of performing [some jobs] . . . .. Employers are concerned with substantial capacity, psychological stability, and steady attendance; they will not unduly risk increasing their health and liability insurance costs.
>
> It said that the question is whether "[i]t is unrealistic to think that they would hire anyone with the impairments of this claimant." Thomas v. Celebrezze, 331 F.2d 541, 546 (4th Cir. 1964).

The Secretary's finding that appellant could perform substantial gainful employment of a sedentary nature was not supported by substantial evidence.

E. The Secretary Unjustifiably Dismissed Appellant's Contentions As to Pain By Relying on The Reports of the Workmen's Compensation Doctors and Disregarding the Reports of Dr. Miller, the Treating Physician.

The administrative law judge in coming to his decision appears to have centered undue attention on the work-related injury suffered by appellant in 1973 and failing to consider the medical reports tracing an increasingly crippling case of degenerative arthritis, appellant's main complaint. In doing so, attention was focused on the reports of the Workmen's Compensation doctors rather than on those of Dr. Miller who was following the course of the arthritis.

The reports of Dr. Miller fully support the testimony of appellant with regard to pain. No doctor states that appellant does not suffer severe pain. (See eg. A-133,205-219) noting the increasingly severe findings of pain and disability by Dr. Miller).

This case is similar to Thorne v. Weinberger, 530 F.2d 580, 582 (4th Cir. 1976) where the Court in commenting on the administrative law judge's decision stated:

> The principal finding of the Hearing Examiner here, however, can only be explained by assuming that he completely disregarded the medical evidence. Contrary to his finding, all the medical evidence indicates that appellant suffered pain from either degenerative arthritis or a herniated disc. The doctors only disagreed on the extent of the incapacity the pain caused, with one determining that it was totally disabling, and another deciding that it impaired appellant by 50 percent. The Hearing Examiner's determination seems to rest on a "mere scintilla of evidence" derived from isolating each doctor's findings, rather than considering the record as a whole.

In the instant appeal, the administrative law judge totally disregarded the findings of pain by Dr. Miller which corroborated the complaints of the appellant.

This was an error by the administrative law judge as the subjective element of pain is an important element to be considered in determining disability under the Social Security Act. Franklin v. Secretary of Health, Education and Welfare 393 F.2d 640, 642 (2d Cir. 1968).

The Secretary's findings with regard to pain are therefore not supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the judgment of the District Court granting summary judgment to the appellee-defendant should be vacated and reversed, and summary judgment should be granted to appellant.

Dated: September 13, 1977
Rochester, New York

Respectfully submitted,

Ian C DeWaal

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Attorneys for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LIONEL J. BASTIEN, Plaintiff-Appellant, vs. JOSEPH P. CALIFANO, in his Official Capacity as Secretary of Health, Education and Welfare, Defendant-Appellee.	AFFIDAVIT OF SERVICE 77-6120

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:

Ian C. DeWaal, being duly sworn, deposes and says:

1. He is over eighteen years of age, is not a party to this action, and resides at 900 Monroe Avenue, Rochester, New York.

2. On the 15th day of September, 1977 he served upon Eugene Welch, Assistant U.S. Attorney, attorney for defendant-appellee; two copies of Appellant's Brief on Appeal; one copy of the Appendix on Appeal; and one copy of the Notice of Appearance, by enclosing same in a post paid wrapper addressed to 233 U.S. Courthouse, Rochester, New York, 14614, the

address designated by said attorney for that purpose and depositing same in an official depository under the exclusive custody and care of the United States Postal Service.

Ian C DeWaal

Ian C. DeWaal

Sworn to before me, this
15th day of September, 1977.

Rosa Lee Sinkler

ROSA LEE SINKLER
NOTARY PUBLIC, State of N. Y. Monroe County
My Commission Expires March 30, 19 78

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail — On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

:-Please take notice that the within is a *(certified)*
e copy of a
ly entered in the office of the clerk of the within
med court on 19

ted,

Yours, etc.,

ONROE COUNTY LEGAL ASSISTANCE CORP.

orney for

Office and Post Office Address

80 West Main Street

ROCHESTER, NEW YORK 14614

torney(s) for

NOTICE OF SETTLEMENT

r:—Please take notice that an order

which the within is a true copy will be presented
r settlement to the Hon.

e of the judges of the within named Court, at

19

M.

ated,

Yours, etc.,

ONROE COUNTY LEGAL ASSISTANCE CORP.

torney for

Office and Post Office Address

80 West Main Street

ROCHESTER, NEW YORK 14614

torney(s) for

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LIONEL J. BASTIEN,

Plaintiff-Appellant,

vs.

JOSEPH P. CALIFANO, in his Official Capacity as Secretary of Health, Education and Welfare,

Defendant-Appellee.

ORIGINAL

AFFIDAVIT OF SERVICE

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(716) 325-2520

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

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Attorney(s) for

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